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# IN THE
# COURT OF APPEALS OF INDIANA

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| DEWAYNE T. EMBERTON, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 18A02-0511-CR-1121 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee. | ) | |

APPEAL FROM THE DELAWARE CIRCUIT COURT NO. 1
The Honorable Marianne L. Vorhees, Judge
Cause Nos. 18C01-0402-FA-0001 and 18C01-0506-FC-0021

**October 3, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SULLIVAN, Judge**

In this consolidated appeal, Appellant, Dewayne Emberton, challenges his sentence to four years executed following his conviction for Possession of a Controlled Substance as a Class C felony[1] in Cause Number 18C01-0402-FA-0001 ("FA-01"), and his sentence to eighteen months executed following his conviction for Possession of Cocaine as a Class D felony[2] in Cause Number 18C01-0506-FC-0021 ("FC-21"). Upon appeal, Emberton claims the trial court erred by improperly considering an aggravator and improperly weighing this aggravator against the mitigators.

We affirm.

According to the factual basis entered during the June 9, 2005 plea hearing under Cause Number FA-01, on November 5, 2003, Emberton was in possession of Oxycodone, a Schedule II controlled substance, within 1000 feet of Ross Park in Delaware County. Emberton did not have a prescription for the Oxycodone. On February 17, 2004, he was charged with dealing in a controlled substance and on June 2, 2005, with possession of a controlled substance. On June 9, 2005, pursuant to a plea agreement, Emberton pleaded guilty to the possession charge. The plea agreement provided that Emberton's sentence would be left open to the court's discretion. On October 27, 2005, the court entered a judgment of conviction on the possession charge and, upon the State's motion, dismissed the dealing charge. The court then sentenced

[1] Ind. Code § 35-48-4-7(a) (Burns Code Ed. Repl. 2004).

[2] Ind. Code § 35-48-4-6(a) (Burns Code Ed. Repl. 2004).

Emberton to the presumptive[3] sentence of four years executed with the Department of Correction.

According to the factual basis entered during the June 9, 2005 plea hearing under Cause Number FA-21, Emberton, on August 26, 2004, knowingly possessed cocaine in Delaware County. He was charged on August 30, 2004 with possession of cocaine as a Class C felony, possession of cocaine as a Class D felony, possession of marijuana, carrying a handgun without a license, and driving while suspended as a Class A misdemeanor due to a prior conviction.[4] During the June 9, 2005 plea hearing, Emberton pleaded guilty to possession of cocaine as a Class D felony. On October 27, 2005, the court entered judgment of conviction on the D-felony cocaine possession charge and, upon the State's motion, dismissed the other four charges. The court then sentenced Emberton to the presumptive sentence of eighteen months with the Department of Correction, to be served consecutively with his four-year sentence in FA-01.

Upon appeal, Emberton claims his sentence was excessive because the court improperly considered his criminal history as an aggravating factor, and it failed to offer proper justification for attributing minimal weight to the mitigators.

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[3] The amended versions of Indiana Code §§ 35-50-2-6 and 7 (Burns Code Ed. Supp. 2006) reference the "advisory" sentence, reflecting the April 25, 2005 changes made to the Indiana sentencing statutes in response to Blakely v. Washington, 542 U.S. 296 (2004), reh'g denied. Since Emberton committed the crimes in question before the effective date of the amendments, we apply the versions of the statutes then in effect and refer instead to the presumptive sentence.

[4] On August 30, 2004, Emberton was charged under Cause Number 18C05-0408-FC-36, but the case was transferred to the instant court on June 6, 2005 and re-designated Cause Number 18C01-0506-FC-21.

We bear in mind that sentencing determinations, including whether to adjust the presumptive sentence, are within the discretion of the trial court. Ruiz v. State, 818 N.E.2d 927, 928 (Ind. 2004). If a trial court relies upon aggravating or mitigating circumstances, it must do the following: (1) identify all significant aggravating and mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. See id.

When a trial court finds aggravating or mitigating circumstances, it must make a statement of its reasons for selecting the sentence imposed. Frey v. State, 841 N.E.2d 231, 234 (Ind. Ct. App. 2006). The trial court need not set forth its reasons, however, when imposing the presumptive sentence. Id. Therefore, if the trial court does not find any aggravators or mitigators and imposes the presumptive sentence, the trial court does not need to set forth its reasons for imposing the presumptive sentence. Id. Yet, if the trial court finds aggravators and mitigators, concludes they balance, and imposes the presumptive sentence, then, pursuant to Indiana Code § 35-38-1-3 (Burns Code Ed. Repl. 1998), the trial court must provide a statement of its reasons for imposing the presumptive sentence. Id.

In its sentencing order, the court gave the following justification for imposing the presumptive sentences in both cases:

> "Certain factors exist that would support an enhanced sentence, and these factors apply to both cause numbers unless specifically stated otherwise:
>
> 1. Defendant has two prior convictions for misdemeanors: Possession of Marijuana, a Class A misdemeanor; and Disorderly Conduct, a Class B misdemeanor.

Certain factors exist that would support a sentence less than the advisory sentence, and these factors apply to both cause numbers unless specifically stated otherwise:

2. Defendant accepted responsibility for his actions and pleaded guilty to the instant offense; however, the Court gives this factor very minimal weight, as Defendant gained a significant advantage from the pleas (dismissing a Class A felony charge and several other felony charges).

3. Defendant states and appears to be remorseful; however, the Court gives this factor very minimal weight, as Defendant has received numerous services from the juvenile and adult justice systems, and he has had numerous opportunities to rehabilitate himself .

4. Defendant appears to have a strong support group in his wife and family.

On balance, the Court finds the factors above balance, warranting the imposition of the advisory sentence. In support, the Court finds the minimal weight from Factors 2, 3, and 4 merely counterbalance the weight of the two prior misdemeanor convictions, one of which was for a drug offense.

Therefore, in Cause No. FA-[]01, on Count 2, Possession of a Schedule II Controlled Substance, a Class C felony, the Defendant is committed to the custody of the Department of Correction for a period of four (4) years, executed.

Defendant shall serve this sentence consecutively to the sentence the Defendant receives in Cause No. 18C01-0506-FC-[]21.

* * *

Therefore, in Cause No. FC-[]21, on Count 2, Possession of Cocaine, Class D felony, the Defendant is committed to the custody of the Department of Correction for an eighteen (18) month period, executed." App. at 14-15.

In offering justification for its sentence, the court found as an aggravator Emberton's two prior misdemeanor convictions, one for possession of marijuana and the

other for disorderly conduct. The court balanced this aggravator against three mitigators, namely Emberton's acceptance of responsibility through the guilty plea and his remorse, both of which the court determined carried "very minimal weight," as well as the mitigator of Emberton's strong support group. App. at 14-15.

In challenging his sentence, Emberton cites Ruiz, claiming that his past misdemeanor convictions were not "connected" to the instant convictions and therefore should not be considered to be an aggravator or at least should not carry such weight so as to outweigh the three mitigators.

We first note that the court imposed the presumptive sentence and informed Emberton before he pleaded guilty of the "high probability" that his sentence in both cases would be executed. Tr. at 9. With regard to Emberton's challenge to the court's consideration of his criminal history as an aggravator, which he claims was not shown to be "connected" to the instant crimes, we recognize that Emberton's criminal history, including a 2001 conviction for possession of marijuana and a 2002 conviction for disorderly conduct, was removed in time and place from the instant offenses. Contrary to Emberton's argument, however, Ruiz does not instruct that a defendant's criminal history must be "connected" to the offense at hand in order to serve as an aggravator. In Ruiz, our Supreme Court determined that the criminal history of a defendant convicted of B-felony child molestation, which consisted of four alcohol-related misdemeanors, could not serve to enhance the ten-year presumptive sentence to a twenty-year maximum sentence because such criminal history was unrelated to the instant crime and relatively insignificant. 818 N.E.2d at 928-29. Part of the Ruiz analysis involves a determination

regarding whether a criminal history is "related" to the instant offenses, but there is no requirement that the history be "connected."[5] In Ruiz the offense of child molestation was not "related" to the defendant's criminal history of various alcohol-related violations. Here, Emberton's prior drug conviction was related to the instant drug possession offenses. While his disorderly conduct conviction was not so related, it nevertheless indicates a certain disregard for acceptable conduct, which bears upon the instant convictions. Furthermore, unlike in Ruiz, where the defendant was facing a maximum twenty-year sentence, here Emberton received the presumptive sentence for his crime. Emberton's case is distinguishable from Ruiz.

With regard to Emberton's challenge to the trial court's weighing of the aggravator against the mitigators, we note that the criminal history aggravator merely served to offset the weight of three mitigators, two of which received "very minimal weight." These two mitigators were Emberton's acceptance of responsibility through his guilty plea and his expression of remorse. Contrary to Emberton's claim, the trial court explained its weighing process, minimizing the significance of the mitigators, because Emberton received "a significant advantage from the pleas," and further, that in spite of his expressions of remorse, Emberton had already received "numerous services from the juvenile and adult justice systems, and he ha[d] had numerous opportunities to

[5] A careful reading of the Ruiz decision reflects that in using the term "related" in conjunction with consideration of a past criminal record, the Supreme Court was focusing upon whether the prior offenses were "manifestly different in nature and gravity" from the instant crime. 818 N.E.2d at 929. Ruiz does not stand for the proposition, as suggested by Emberton, that the prior offenses be "connected" in terms of time, place or circumstance. Under a Ruiz analysis, relatively minor offenses remote in time and of a totally different nature than the instant crime may be deemed an insignificant aggravator.

rehabilitate himself." App. at 14-15. Although a trial court should be inherently aware that a guilty plea is a mitigating factor, such plea is not necessarily a significant mitigating factor. See Scott v. State, 840 N.E.2d 376, 382-83 (Ind. Ct. App. 2006), trans. denied. Further, a trial court is in the best position to determine whether a defendant genuinely has remorse, because it has the ability to observe the defendant directly and listen to the tenor of his voice. See Corralez v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). We conclude the trial court was well within its discretion to afford Emberton's plea minimal weight in light of the numerous charges against him which were dropped pursuant to the plea, conferring upon him a substantial benefit. We further decline to interfere with the trial court's evaluation of Emberton's remorse. Considering that these two mitigators deserved "very minimal weight" and that the only other listed mitigator was that Emberton had a strong support group in his wife and family, which the court also determined carried "minimal weight," we find no error in the court's concluding they merely counterbalanced the aggravator of criminal history and the court's consequential imposition of the presumptive sentence. App. at 14-15. See Ruiz, 818 N.E.2d at 929 (remanding for imposition of the presumptive sentence following a finding that criminal history, which was the only aggravator, should not be significant when weighed against mitigators of plea agreement, which was not afforded significant weight, and remorse).

The judgment of the trial court is affirmed.

BAKER, J., and MAY, J., concur.